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No. 98-84

Supreme Court, U.S.

FILED

DEC 8 1998

CLEAR

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT

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December 8, 1998

58 pp
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QUESTION PRESENTED

Whether the court of appeals properly held that respondent -- a student-athlete arbitrarily denied eligibility to participate in intercollegiate athletics because of her gender -- can state a claim against the National Collegiate Athletic Association arising under Title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987, and therefore that respondent should be permitted to amend her complaint.

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INTRODUCTION

The issue in this case is whether Renee Smith will have the opportunity to show that the National Collegiate Athletic Association ("NCAA") engaged in discrimination in violation of section 901(a) of Title IX of the Education Amendments of 1972 ("Title IX"), when it arbitrarily denied her the opportunity to play intercollegiate volleyball at Hofstra and at the University of Pittsburgh because of her gender. Title IX was enacted to eliminate sex-based discrimination in the many federally-assisted education programs in this nation, including the pervasive discrimination and inequality that infected intercollegiate athletics. The NCAA governs virtually all significant aspects of intercollegiate athletics in the United States. As a practical matter, a statutory scheme intended to end sex-based discrimination in intercollegiate athletics must cover the NCAA, as well as its member institutions, or it cannot conceivably achieve its goal.

Congress did not overlook this fundamental reality. Title IX, as amended by the Civil Rights Restoration Act of 1987, defines intercollegiate athletics at federally-assisted colleges and universities as covered education programs. Section 901(a) of Title IX broadly prohibits sex-based discrimination "*under* any education program or activity receiving Federal financial assistance." (emphasis supplied.) Section 901(a) does not limit Title IX coverage to recipients of Federal financial assistance; instead, it forbids any entity with authority over a covered education program, including intercollegiate athletics, to engage in sex-based discrimination. The NCAA plainly has such authority and it is subject to Title IX whether or not it receives Federal assistance. On this basis alone, Smith alleged a violation of Title IX when she alleged that the NCAA discriminated against her on the basis of her sex by denying her eligibility to play intercollegiate volleyball at two

federally-assisted institutions, Hofstra and University of Pittsburgh.

In any event, the NCAA receives Federal assistance. Accordingly, in the alternative, as the court of appeals correctly held, Smith was entitled to amend her complaint to allege that the NCAA is subject to Title IX because it directly and indirectly receives Federal financial assistance. Such an amendment would cure any arguable deficiencies in Smith's Title IX claim. Under the generous standard applied to requests to amend pleadings to cure deficiencies, Smith, a pro se plaintiff, was plainly entitled to amend her complaint.

Smith had a good faith basis for her proposed amendment: She learned during the pendency of her case that the NCAA administers the National Youth Sports Program ("NYSP") and controls the NYSP Fund, which receives Federal financial assistance, and Smith sought to allege that the NCAA receives the assistance provided to the Fund, either directly or indirectly. In addition, Smith sought leave to allege that the NCAA indirectly receives Federal assistance from Hofstra and University of Pittsburgh, because those federally-assisted institutions assign the operation of numerous aspects of their intercollegiate athletic programs to the NCAA and provide the NCAA with funds and other consideration to carry out that assignment. These allegations of direct and indirect receipt of Federal financial assistance suffice to subject the NCAA to Title IX.

For these reasons, the court of appeals properly remanded this case to the district court to allow the complaint to be amended and to permit this case to proceed with discovery and an ultimate determination of its merits.

STATEMENT OF THE CASE

1. Renee M. Smith graduated from high school in the spring of 1991, and enrolled in St. Bonaventure University that autumn. There she played intercollegiate volleyball during the 1991-92 and 1992-93 seasons. She elected not to participate in intercollegiate volleyball during the 1993-94 season so that she could graduate in a remarkably short two and a half years. In 1994, Smith enrolled in a postbaccalaureate program at Hofstra; and in 1995, she enrolled in a postbaccalaureate program at the University of Pittsburgh.¹ Smith had used only two years of her collegiate eligibility playing intercollegiate volleyball at St. Bonaventure, and she wanted to play at Hofstra during the 1994-95 season and at University of Pittsburgh during the 1995-96 season. Pet. App. 3a-4a.

Hofstra and University of Pittsburgh are members of the NCAA. The NCAA is an unincorporated association comprised of 1,200 public and private colleges and universities. It promulgates rules governing all aspects of intercollegiate athletics, including recruiting, academic standards for student-athletes and, pertinent here, eligibility for participation in intercollegiate athletics. See *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988) (the NCAA has "adopted rules, which it calls 'legislation,' governing the conduct of the intercollegiate athletic programs of its members") (citation omitted). "By joining the NCAA, each member agrees to abide by and enforce such rules." *Id.* As the NCAA describes, it and its member institutions profit greatly from their joint enterprise, earning annual revenues of \$200 million. See Pet. Brief ("Br.") at 4.

¹ St. Bonaventure offered neither of the postbaccalaureate programs that Smith decided to pursue.

Members which decide not to accede to NCAA authority stand to lose their right to participate in this lucrative enterprise.

The NCAA has enacted and enforces a Bylaw that governs the participation of postbaccalaureate students, such as Smith, in intercollegiate athletics. Specifically, Bylaw 14.1.8.2. ("Postbaccalaureate Bylaw") inferentially provides that a student-athlete may not participate in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree:

A student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree of its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period .

...

Smith was in good academic standing and in compliance with all NCAA eligibility requirements other than the Postbaccalaureate Bylaw for the 1994-95 and 1995-96 athletic seasons. At Smith's behest and on her behalf, Hofstra and University of Pittsburgh applied for waivers of the Postbaccalaureate Bylaw

so that Smith could continue to play intercollegiate volleyball. The NCAA waiver committee without explanation denied both requests and Smith was not permitted to participate. Pet. App. 4a-5a. Remarkably, the NCAA in its brief to this Court made absolutely no attempt to explain what rational basis exists for refusing to allow a student in Smith's situation to play intercollegiate athletics or, more generally, to explain its process for making waiver determinations.

Many of the NCAA's member institutions receive Federal financial assistance. Pet. Br. at 3. In addition, the NCAA itself administers the NYSP and controls the NYSP Fund which, for purposes of any motion to dismiss, receives Federal financial assistance. See *Bowers v. NCAA*, 9 F. Supp. 2d 460, 493-94 (D.N.J. 1998); *Cureton v. NCAA*, Civ. No. 97-131, 1997 WL 634376, at *2 (E.D. Pa., Oct. 9, 1997); Letters from the Office for Civil Rights, Department of Health and Human Services to Title IX complainant, dated Nov. 8, 1994, and March 10, 1998 (finding that "[t]he NCAA . . . is a recipient of Federal financial assistance through a Community Services Block Grant from this Department").² As described *infra* at 35-36, through the NYSP and the NYSP Fund, the NCAA is in "partnership with the Federal government" and is subject to Title IX.

2. In August 1996, Smith, proceeding pro se, instituted this action against the NCAA. In her complaint, she alleged that the NCAA's discriminatory treatment of requests for waivers of NCAA Bylaws violates Title IX of the

² As explained *infra* at 34-35, the cases and letters cited in text constitute part of Smith's good faith basis to amend her complaint to allege that the NCAA directly and indirectly receives Federal financial assistance. The letters from the Office of Civil Rights, Department of Health and Human Services, have been lodged with the Court.

Education Amendments of 1972.³ Specifically, Smith alleged that the NCAA discriminatorily grants waivers of its Bylaws to male student-athletes, and thus, that if she were a male, she would have been permitted to use the final two years of eligibility. The NCAA filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Smith had not alleged and could not allege that the NCAA receives Federal financial assistance and that she was required to do so to avoid dismissal of her claim under Title IX.⁴

In response, Smith argued that the NCAA "is a recipient of federal funds and benefits greatly from the aid." Plaintiff's Br. in Opposition to Motion to Dismiss at 5 (Docket No. 9, dated Nov. 19, 1996). She also asserted that the NCAA should be covered by Title IX because "it enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity" so that "[a]s a matter of public policy, this Court should subject NCAA actions regarding the operation of education institutions to Title IX scrutiny." *Id.* at 6 (quoted in Pet. App. 30a). Finally, she pointed out that "although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees." *Id.*

³ Smith also alleged that the NCAA's promulgation and enforcement of the Postbaccalaureate Bylaw violates section 1 of the Sherman Act, 15 U.S.C. §1, and constitutes a breach of contract under state law.

⁴ In support of its motion to dismiss, the NCAA submitted the Affidavit of Frank E. Marshall which asserts that "[t]he NCAA receives no federal financial assistance of any kind." Docket No. 5, filed Oct. 28, 1996. A pro se plaintiff confronted with such an assertion likely would view it as a statement of fact; it is, in the circumstances presented here, a legal conclusion. The Affidavit goes on, at least incompletely, to describe the NYSP Fund. Compare with *Bowers*, 9 F. Supp. 2d at 493-94.

On May 21, 1997, the district court dismissed Smith's complaint for failure to state a claim. The district court refused to construe Smith's complaint to allege that the NCAA received Federal financial assistance either directly or indirectly. In addition, the court held that the alleged connections between the NCAA and Federal financial assistance to member institutions were "too far attenuated" to make the NCAA a recipient of Federal funds. Pet. App. 32a.⁵

Smith then filed a motion for leave to amend her complaint. She sought to amend the complaint to add Hofstra and University of Pittsburgh as defendants, and to add an allegation that the NCAA receives Federal financial assistance within the meaning of Title IX. She explained in her motion that she intended the amended complaint to cure any defects in alleging jurisdiction over the NCAA. Pet. App. 18a. And, in her proposed amended complaint, she alleged that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." *Id.* (quoting Appellate Appendix at 98).

On June 5, 1997, the district court denied Smith's motion for leave to amend her complaint against the NCAA "as moot, the court having granted defendant's motion to dismiss on May 20, 1997." Pet. App. 36a. Smith filed an appeal in the

⁵ With respect to the Sherman Act claim, the court held that the NCAA's implementation of the Postbaccalaureate Bylaw was not related to its commercial or business activities and did not provide the NCAA or its member institutions with any commercial advantage and thus "is not the type of action to which the Sherman Act was meant to be applied." Pet. App. 28a. The state law contract claim was dismissed as a result of dismissal of the two Federal claims.

Third Circuit. She argued that the district court's decisions dismissing her complaint and denying her motion to amend should be reversed. Smith specifically contended that "the NCAA directly and indirectly receives federal funding, which makes the [NCAA] a 'recipient' of federal aid and subject to Title IX scrutiny." Smith Br. at 9. See *id.* at 21 ("the NCAA directly and indirectly receives federal funding"); *id.* at 22 ("[t]he NCAA's National Youth Sports Program receives direct federal funding").⁶

The court of appeals reversed the district court's order denying Smith leave to amend her Title IX claim against the NCAA. The court noted that "it is unclear whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded." Pet. App. 17a. Either way, the court held that denial of Smith's motion to amend was an abuse of discretion, because Smith could amend her complaint to allege that the NCAA is subject to Title IX.

The court stated that "the NCAA is subject to Title IX provided that it receives federal financial assistance within the meaning of section 1681(a)," *i.e.*, that an allegation that the NCAA receives Federal financial assistance would suffice to withstand a motion to dismiss. The court explained that Hofstra and University of Pittsburgh (and other NCAA member institutions) are education programs and activities which receive Federal financial assistance, and that the NCAA acts as its member institutions' "surrogate" with respect to intercollegiate athletics. If the NCAA receives funds from member institutions

⁶ The NCAA is thus simply wrong when it asserts in its brief to this Court that Smith failed to raise in the lower courts the question whether the NCAA directly receives Federal financial assistance. See Pet. Br. at 13 n.7.

to be used in the governance of a joint enterprise of those member institutions, it may be treated as the indirect recipient of Federal funds received by those member institutions. Thus, the court reasoned, Smith's complaint would withstand a motion to dismiss if she alleged that the NCAA indirectly receives Federal financial assistance. See Pet. App. 13a-16a.

The court affirmed the district court's dismissal of Smith's original complaint because it contained no allegation that the NCAA received Federal financial assistance either directly or indirectly.⁷ But because Smith had a basis to amend her complaint to cure this defect, the court of appeals held that the district court abused its discretion when it refused to grant Smith leave to amend her complaint. The court thus "vacated [the district court's order] insofar as the dismissal of the Title IX claim, [and] reversed insofar as the denial of the motion for leave to amend the complaint with respect to the Title IX claim." See Pet. App. 37a-38a. It remanded the case to the district court "for further proceedings in accordance with the opinion of this Court" -- *i.e.*, to allow Smith to amend her complaint. See *id.* at 37a-38a (Judgment, dated March 16, 1998).⁸

⁷ Judge McKee did not concur in this holding of the other panel members. He would have held that "Smith's original complaint sufficiently states that the NCAA receives federal financial assistance under the pleading requirements that we apply to pro se complaints." Pet. App. 16a (citing *Zilch v. Lucht*, 981 F.2d 694 (3d Cir. 1992) ("When, as in this case, plaintiff is a pro se litigant, we have a special obligation to construe [her] complaint liberally.") (alteration in original)). The other two panel members concluded, however, that Smith's pro se status simply underscored her right to amend her complaint to allege that the NCAA receives Federal financial assistance.

⁸ On May 27, 1998, the district court filed Smith's proposed amended complaint as her first amended complaint.

Both parties filed timely petitions for rehearing *en banc* which were denied on April 20, 1998. Pet. App. 39a. This Court granted the NCAA's petition for *certiorari*.

SUMMARY OF ARGUMENT

I. Title IX contains two distinct causes of action: (a) a private cause of action for all appropriate relief, including money damages, see section 901(a) of Title IX, 20 U.S.C. §1681(a); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); (b) a Federal administrative enforcement scheme which authorizes Federal departments and agencies to regulate federally-assisted programs and activities and, after a finding of non-compliance, to terminate Federal financial assistance. Renee Smith filed a private cause of action alleging that the NCAA violated section 901(a) of Title IX when it denied her the opportunity to play intercollegiate volleyball at two federally-assisted institutions, Hofstra and University of Pittsburgh, because of her gender. These allegations state a claim against the NCAA.

Section 901(a)'s plain language makes clear that it was "enacted for the benefit of a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. It does not define a class of defendants and, *a fortiori*, does not limit liability solely to recipients of Federal financial assistance. *Id.* at 692-93. Instead, section 901(a) prohibits discrimination "*under any education program or activity receiving Federal financial assistance.*" (emphasis supplied.) The natural meaning of section 901(a) therefore is that any entity with authority over a federally-assisted education program that discriminates on the basis of gender may be held accountable for its actions under Title IX.

The CRRA, which defines "program or activity" under section 901(a) broadly as "all of the operations of" a federally-assisted education entity, supports this reading. While an education entity generally retains authority over its "operations," it may assign that authority to a third party, as occurred here. The NCAA was assigned authority over the operation of federally-assisted intercollegiate athletic programs and is thus liable for its discrimination.

It is also instructive to contrast the language of section 901(a) with that of section 902(1). The latter authorizes Federal fund termination with respect to "recipients," a word that does not appear in section 901(a). By contrast, the Federal courts may not order the termination of Federal funding, but are not limited to administrative remedies. See, e.g., *Gwinnett*, 503 U.S. at 76. Federal courts have the power to award "all appropriate relief," *id.* at 68, against such an institution. Relief is plainly most appropriate when awarded against the party which is responsible for, and carries out, the discrimination. That conclusion is particularly apt here: The NCAA alone can provide female student-athletes with a nondiscriminatory opportunity to participate in intercollegiate athletics.

Relevant legislative history, too, supports the plain meaning of section 901(a). Congress intended its action to end sex discrimination in intercollegiate athletics. To be sure, there is no legislative history addressing the parameters of the private cause of action in 1972, see *Gwinnett*, 503 U.S. at 71. But the history of the CRRA, which amended Title IX, reflects Congress' concern with those "who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination." S. Rep. No. 100-64, at 25 (1987) (quotation omitted). Even the NCAA testified that the CRRA's definition of "program or

activity" would cover non-recipients with authority over a federally-assisted program.

In the unusual circumstance where an entity with authority over a federally-assisted program is not the entity that receives Federal assistance, holding the former liable serves Title IX's dual purposes. *First*, it protects the benefited class by providing entities with authority over a federally-assisted program with clear notice that sex-based discrimination is forbidden. Such entities may then, at their option, decline such authority, but, if they accept it, they do so with full knowledge that they may not discriminate. *Second*, it most effectively deters use of federal resources to support discrimination, because the entity which is responsible for, and carries out, discrimination has the best notice and, as here, the best opportunity to take corrective action.

The NCAA's counter argument - that Title IX is Spending Clause legislation and that, absent a contract with the Government, the NCAA lacked constitutionally adequate notice that it was covered - is contrary to established law. Title IX is based not only on the Spending Clause, but also on Congress' authority under section 5 of the Fourteenth Amendment. And, as *Grove City College v. Bell*, 465 U.S. 555 (1984) holds, Title IX covers indirect recipients of Federal aid -- entities which plainly are not in privity with the Government. The actual scope of Spending Clause legislation, including Title IX, turns on the policies and purposes of the legislation. Entities with authority over federally-assisted programs have clear notice that they are subject to Title IX, and the purposes of Title IX are best served by their coverage.

For all of these reasons, Smith's allegation that the NCAA arbitrarily denied her eligibility at Hofstra and University of Pittsburgh based on her gender states a claim under Title IX

whether or not the NCAA receives Federal financial assistance, and her case should proceed on its merits.

II. The judgment of the court of appeals reversed the district court's denial of Smith's motion for leave to amend and remanded the case so that Smith could file an amended complaint alleging that the NCAA directly and indirectly receives Federal assistance. This judgment was plainly correct. Smith's amended allegations address the NCAA's receipt of assistance through the NYSP Fund and through member institutions and cure any arguable deficiencies in Smith's Title IX claim. There was no other basis to deny Smith's motion to amend under the generous standard embodied in Fed. R. Civ. P. 15(a), particularly in light of Smith's pro se status.

Smith had a good faith basis for her proposed amendment, because she learned during the pendency of this case that the NCAA administers the NYSP and operates the NYSP Fund, and thus clearly should be considered a recipient of Federal assistance for purposes of a motion to dismiss. *E.g.*, *Bowers*, 9 F. Supp. 2d at 493-94. On this basis alone, the judgment of the court of appeals should be affirmed.

III. Indirect recipients of Federal financial assistance are subject to Title IX. *Grove City*, 465 U.S. at 564. The NCAA indirectly receives such assistance through the NYSP Fund. The evidence described in *Bowers* supports a claim that the NYSP Fund serves only as a conduit for conveyance of Federal aid to the NCAA. In addition, the CRRA effectively defines the NCAA as an indirect recipient of Federal assistance from the NYSP Fund. More specifically, the NCAA is a "program or activity" within the meaning of the CRRA, because it is a covered education institution under sections 1687(3)(ii) and (4) of that Act, and has a federally-assisted "operation" or "part" -- the NYSP Fund.

In addition, the NCAA indirectly receives Federal assistance through assignment by member institutions of authority over intercollegiate athletic programs, accompanied by dues and other consideration to carry out that assignment. The NCAA is not a routine downstream payee of a federally-assisted education institution, like a utility or a goods supplier. Those are mere beneficiaries and are plainly not subject to Title IX. Cf. *United States Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 607 (1986). By contrast, the NCAA has accepted assignment of authority over a federally-assisted program and of funds from a federally-assisted education entity. Accordingly, the NCAA has accepted the legal obligations that run with that authority, including the obligation not to discriminate on the basis of sex. That conclusion is supported by decisions of this Court, by the substantial weight of lower court authority, and by the unique nature of the NCAA and intercollegiate athletics. The NCAA also is a Federal assistance recipient under the CRRA. It is an "operation" of federally-assisted colleges and universities and is therefore a "program or activity" for purposes of Title IX.

ARGUMENT

THE COURT OF APPEALS' JUDGMENT GRANTING SMITH'S MOTION TO AMEND HER COMPLAINT AND ALLOWING SMITH'S TITLE IX CLAIM AGAINST THE NCAA TO PROCEED ON ITS MERITS SHOULD BE AFFIRMED.

I. *Smith's Allegations That The NCAA Discriminated Against Her Under A Federally-Assisted Education Program Or Activity State A Claim For Violation Of Title IX.*

Introduction

Section 901(a) of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §1681(a), provides, in part, that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.⁹

Title IX is enforced through two different causes of action: First, the statute may be enforced through a private cause of action for all appropriate relief, including money damages, see

⁹ Section 901(a) is modeled on the prohibition of race and national origin discrimination in Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. §2000d, as were section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102, prohibiting discrimination on the basis of disability and age, respectively.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Second, the statute provides for Federal administrative enforcement and specifically authorizes Federal departments and agencies empowered to extend Federal financial assistance to education programs and activities to issue regulations and to "terminat[e] or refus[e] to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record . . . of a failure to comply . . ." Section 902(1) of Title IX, 20 U.S.C. §1682(1). See also section 902(2), 20 U.S.C. §1682(2) (enforcing compliance "by any other means authorized by law").

This case involves a private cause of action. Renee Smith alleged that, on the basis of sex, she was denied participation in, the benefits of, and subjected to discrimination under education programs and activities receiving Federal financial assistance -- to wit, intercollegiate athletics sponsored by Hofstra and University of Pittsburgh.¹⁰ She further alleged that the NCAA carried out, and was responsible for, that discrimination. As we now show, Smith's allegations plainly state a claim for relief against the NCAA that may be enforced through a private cause of action arising under section 901(a).¹¹

¹⁰ The NCAA acknowledges that intercollegiate athletics is an education program or activity within the meaning of Title IX. See 34 C.F.R. § 106.31 (so providing). See also NCAA Constitution, art. II ("[t]he competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body").

¹¹ Smith, proceeding pro se, made the essence of this argument to the district court when she asserted that the NCAA "enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity"

A. *The Plain Language Of Section 901(a) Of Title IX Clearly Extends To The NCAA's Alleged Conduct.*

Section 901(a)'s plain language makes clear that it was "enacted for the benefit of a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. Phrased as it is in the passive voice, it "expressly identifies the class Congress intended to benefit" and makes that protection its primary focus. *Id.* at 690.

Section 901(a) does not expressly define a class of defendants. Significantly, it does not limit liability for discrimination to recipients of Federal financial assistance, and is not written "simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to education institutions engaged in discriminatory practices." *Cannon*, 441 U.S. at 691-93. It does not say, as the NCAA would have it, that there may be no sex-based discrimination "by any education program or activity receiving Federal financial assistance," but rather that there shall be no such discrimination "under any education program or activity receiving Federal financial assistance." (emphasis supplied.) The natural meaning of the latter phrase is that, while the education program or activity must receive Federal financial assistance, *any* entity with authority over such a program or activity which discriminates on the basis of sex may also be held

so that "[a]s a matter of public policy, this Court should subject NCAA actions regarding the operation of education institutions to Title IX scrutiny." See Pet. App. 29a-30a (citation omitted). On this theory, this Court need affirm only the portion of the court of appeals' judgment remanding the case to the district court for further proceedings (though the court of appeals' instruction that Smith is entitled to amend her complaint would also be correct, see *infra* Part II).

accountable for that discrimination whether or not it receives Federal assistance. The NCAA, which has authority over intercollegiate athletics at its federally-assisted member institutions, including Hofstra and University of Pittsburgh, is such an entity.

The definition of "program or activity" added to Title IX by the CRRA in 1987 hammers this point home. The CRRA defines "program or activity" expansively to include "*all of the operations of*" an education entity "any part of which is extended Federal financial assistance." 20 U.S.C. § 1687 (emphasis supplied). An "operation" of an education entity may be conducted by the entity itself, but it may also be assigned in whole or in part to a third party (e.g., the operation of intercollegiate athletics is assigned in large part to the NCAA). Section 901(a) is best read to extend coverage to all entities with authority over the operation of federally-assisted programs or activities.

In the usual Title IX case brought by a private plaintiff for sex discrimination in an education program or activity, the defendant will be the entity that receives Federal financial assistance. But there will be cases where a third party has authority over an education program or activity and is, in fact, the party alleged to be engaged in discrimination. With respect to cases that fall into this category, the language and structure of section 901(a) follow the traditional rule that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages *from the party in default* is implied." *Gwinnett*, 503 U.S. at 67 (quoting

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis supplied)).¹²

B. *The Contrast Between Section 901(a) And Section 902 Supports A Clear Inference That Section 901(a) Extends To Cover The NCAA's Alleged Conduct.*

1. The language of section 901(a), creating the private cause of action for enforcing Title IX, may be contrasted with the language of section 902, which creates the Federal administrative enforcement scheme for Title IX. Section 902(1) contains language strongly suggesting that Federal fund termination is limited to "recipients" of Federal financial assistance:

Each Federal department and agency which is empowered to extend Federal financial

¹² In arguing that only recipients of Federal financial assistance are subject to Title IX, the NCAA relies on lower court decisions holding that Title IX does not give rise to a private right of action against individuals, Pet. Br. at 28, but that reliance is misplaced. First, this Court has never decided whether individuals can be liable under Title IX. In any event, section 901(a) may easily be read not to create individual liability without artificially limiting coverage solely to Federal assistance recipients. Section 901(a) prohibits discrimination "*under* education programs and activities" which are defined as "*all of the operations of*" education entities. (emphasis supplied.) The underlined words suggest that only entities with authority over the operation of education programs and activities are liable for Title IX violations, and that individual agents of such entities, not acting pursuant to official policy or practice, are not liable. Thus, holding the NCAA subject to Title IX in a situation where it is alleged to have excluded a student, solely on the basis of gender, from participating in a Federal program that it controls does not require a significant expansion of the number of Title IX defendants. This case, however, presents no occasion for the Court to determine whether an individual may be liable for violating section 901(a) of Title IX.

assistance to any education program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the *termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement* . . . (emphasis supplied.)

Section 901(a), the source of the private cause of action, however, does not use the word "recipient" and does not suggest enforcement is limited to "recipients." To the contrary, its only requirement is that the discrimination occur "under an education program or activity receiving Federal financial assistance." As described above, there must *be* an education program or activity receiving Federal financial assistance, and discrimination based on sex *under* that program or activity must be alleged; but once those conditions are satisfied, any entity with authority over the operation of such a program or activity (including, and almost always, a recipient) is liable to members of the protected class.¹³

¹³ Finding that the NCAA is the responsible party for causing a flagrant violation of section 901(a) and is subject to whatever remedies are appropriate for that violation thus does not subject its member institutions to fund

This natural reading of section 901(a) is supported by this Court's holding that, in a private action to enforce Title IX, Federal courts have the power to "award any appropriate relief" necessary to remedy a violation, see *Gwinnett*, 503 U.S. at 71. In such a private action, Federal courts have remedial authority that is different from administrative remedial authority. So, for example, Federal courts may not terminate Federal funding, but money damages are available in a private right of action, although they have not been provided through the Federal administrative enforcement scheme. See *Gwinnett*, 503 U.S. at 76.¹⁴ Indeed, damages are available in a private action in part because some victims (*i.e.*, those for whom an injunction or a change in policy would be too late) would otherwise be without appropriate relief, "remediless." *Id.* Cf. *Cannon*, 441 U.S. at 711 ("The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section").

Similarly here, the Court's power to "award any appropriate relief" allows it to reach the entity with authority over the operation of a federally-assisted education program or activity. Relief is most "appropriate" when it is awarded against the party which is responsible for, and carries out, discrimination under a federally-assisted education program.

termination. (By contrast, the funds received by the NYSP Fund would expose the NCAA to the full panoply of administrative responsibilities because its status would be that of a recipient covered by section 902(1)).

¹⁴ See also *Gebser v. Lago Vista Indep. School District*, 118 S. Ct. 1989, 1998-99 (1998) ("there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with [Title IX]," and thus the private cause of action potentially allows "imposition of greater liability" than the public enforcement scheme).

Moreover, the NCAA alone can provide Smith and other female student-athletes with a nondiscriminatory opportunity to participate in intercollegiate athletics. The NCAA dominates intercollegiate athletics. If member institutions like Hofstra and University of Pittsburgh simply withdraw from the NCAA in response to alleged discrimination, their female student-athletes will lose *any* opportunity to play intercollegiate athletics. That is not an appropriate remedy for a violation of section 901(a) of Title IX: It leaves victims of discrimination under federally-assisted education programs and activities unprotected (and possibly worse off than if they had tolerated discrimination), and it allows intercollegiate athletics to continue operating under discriminatory rules and practices. Cf. *Gebser*, 118 S.Ct. at 1999 (recognizing that damages for violations under Title IX "in a particular case might well exceed a recipient's level of federal funding").

2. *United States Dep't. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 607 (1986), is not to the contrary. There, while interpreting the scope of its rulemaking authority under section 504 of the Rehabilitation Act of 1973, the Department of Transportation ("DOT") concluded that it did not have jurisdiction to regulate commercial airlines that did not receive Federal financial assistance. The court of appeals vacated DOT's regulations and ordered DOT to apply its regulations to all carriers. This Court, however, held that mere beneficiaries of Federal assistance given to airport operators were not subject to DOT's jurisdiction, and that extending the reach of section 504 to beneficiaries of Federal aid would give it "almost limitless coverage." *Id.* at 608.

There are three reasons *Paralyzed Veterans* should not be read to provide that a private cause of action enforcing Title IX will lie only against recipients of Federal financial assistance.

First, as *Cannon* and *Gwinnett* make plain, the scope of the private right of action to enforce Title IX and Federal administrative authority are not perfectly congruent; the remedies for the private right of action are different, embracing appropriate relief for violations. *Second*, the only issue in *Paralyzed Veterans* was whether DOT had jurisdiction over mere beneficiaries of Federal assistance. No party ever suggested that commercial airlines participated in any way in (let alone governed or controlled) the specific "program or activity receiving Federal financial assistance" at issue. The Court thus had no occasion to determine whether an entity with authority over the operations of a federally-assisted program or activity is liable for discrimination thereunder in a private cause of action. *Finally*, holding entities which operate federally-assisted programs or activities liable for their own discrimination *thereunder* will not result in "limitless coverage," as would occur if coverage traveled with the economic ripple effect of Federal aid.

* * * *

A plaintiff in a private right of action enforcing Title IX is entitled to "any appropriate relief." *Gwinnett*, 503 U.S. at 71. Here that appropriate relief necessarily includes a right to seek relief for sex-based discrimination from the NCAA, the entity alleged to have discriminated in its operation of federally-assisted education programs.

C. *Legislative History Supports The Plain Meaning And Structure Of Title IX.*

An implied limitation on the class of defendants subject to Title IX liability is especially unwarranted in the context of intercollegiate athletics. The history of Title IX and the CRRA, which amended Title IX, manifest Congress' intent that Title

IX's prohibitions end sex discrimination in intercollegiate athletics.¹⁵ The NCAA was the singular, powerful sovereign of intercollegiate athletics in 1972, when Title IX was enacted, and in 1987, when the CRRA was enacted, and remains so today. The broad language of Title IX ensures that entities such as the NCAA -- that is, entities with the power and opportunity to discriminate -- are subject to suit under section 901(a).

There was no legislative history specifically addressing the parameters of the private right of action enforcing section 901(a) in 1972, because that cause of action was implied. See *Gwinnett*, 503 U.S. at 71. But in 1987, well after this Court found Title IX enforceable through a private cause of action in *Cannon*, Congress passed the CRRA which substantially expanded Title IX's coverage by defining "program or activity" broadly to include "all of the operations of" an education entity

¹⁵ Shortly after Title IX's enactment, Senator Tower sought first an amendment exempting intercollegiate athletics from coverage and then an amendment exempting revenue-producing intercollegiate sports from coverage. The Tower Amendments failed, and were replaced by the Javits Amendment instructing the Department of Health, Education, and Welfare to draft regulations that "with respect to intercollegiate athletics [include] reasonable provisions considering the nature of particular sports." See Gender and Athletics Act, P.L. 93-380, section 844, 88 Stat. 484, 612 (1974). This amendment, and the regulations implementing it, demonstrate Congress' special concern with discrimination in intercollegiate athletics.

Thereafter, the debates on the CRRA reveal Congress' strong and uniform concern with ending discrimination in intercollegiate athletics. See, e.g., S. Rep. No. 100-64, at 2 ("Title IX has broken down a variety of sex barriers in education, including participation in athletics"); 134 Cong. Rec. S248 (1998) (without the CRRA, women may be denied the right "to participate fully in every aspect of the curriculum or interscholastic sports may be denied") (Statement of Sen. Simon); 134 Cong. Rec. H566 (1988) (without the bill, institutions will be "denying equal opportunity to young women in athletics") (Statement of Rep. Hawkins). See also *Cohen v. Brown University*, 991 F.2d 888, 894 (1st Cir. 1993) (describing legislative history).

"any part of which is extended Federal financial assistance." 20 U.S.C. § 1687. In so doing, Congress explained that it wanted to ensure that Title IX reached those in a position to injure others with their discrimination:

Congress was not concerned with regulating the activities of the tens of millions of Americans who are the ultimate beneficiaries of the federal financial assistance, but who in no sense operate a federally financed program or activity. Rather, *Congress was concerned with the state agencies, the educational institutions and others who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination.* [S. Rep. No. 100-64, at 25 (quotation omitted; emphasis supplied.)]

Indeed, in its testimony related to the CRRA and its predecessors, the NCAA stated its view that the CRRA's amendment would extend Title IX to cover athletic conferences with authority to operate education programs, but which do not themselves receive Federal assistance:

the legislation -- as I understand it -- will bring under Federal rule making and enforcement authority aspects that, in fact, do not receive Federal aid. The bill provides, I believe, that if one BEOG-aided nursing student attends Kansas State University, the K-State crew -- a club sport only -- would be under Title IX, the Big Eight Athletic Conference would be under Federal inspection and enforcement. . . . [Hearings Before the House Education and Labor Committee and the Subcommittee on

Civil and Constitutional Rights of the House Judiciary Committee, 98th Cong., 225 (1984)(statement of Ruth M. Berkey, NCAA Assistant Executive Dir.). See also *id.* at 141.]¹⁶

This history, though scanty, fully supports a broad reading of section 901(a) to prohibit discrimination by all entities with authority over the operations of federally-assisted education programs and activities.

D. *The Purposes Of Title IX Can Only Be Adequately Served By Holding The NCAA Potentially Liable For The Conduct Alleged.*

1. In the unusual circumstance where the entity with authority over a federally-assisted education program or activity is not the entity which receives the Federal assistance, holding the former liable for its own discrimination serves both of Title IX's purposes.

First, Title IX coverage of such entities plainly furthers the statute's purpose of "provid[ing] individual citizens effective protection against [discriminatory] practices." *Cannon*, 441 U.S. at 704. Section 901 of Title IX provides entities with authority over the operations of federally-assisted education programs or activities with ample notice that they are forbidden to discriminate on the basis of sex.¹⁷ When entities with power

¹⁶ See also n. 34 *infra*, describing Senator Hatch's understanding of the breadth of Title IX coverage under the CRRA.

¹⁷ Cf. *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 286 n.15 (1987) ("[t]he contrast between the congressional preference at issue in *Pennhurst [State School and Hospital v. Halderman]*, 451 U.S. 1, 19 (1981), which was merely precatory) and the antidiscrimination mandate of § 504 [of

and control over federally-assisted education programs are on clear notice that they are liable for their own discrimination, the special class for whose special benefit Title IX was enacted is most effectively protected. Such entities may, at their option, elect not to accept authority over federally-assisted education programs, but, if they do, they have full knowledge that they may not exercise their authority discriminatorily.

Second, holding the entity that is responsible for, and engages in, discrimination liable also deters the "use of federal resources to support discriminatory practices." *Cannon*, 441 U.S. at 704. That entity is most likely to be on notice of that discrimination and has the best (possibly the only) opportunity to institute corrective measures.

This case provides an excellent illustration of both points. The direct Federal assistance recipients, Hofstra and University of Pittsburgh, have assigned substantial authority over their intercollegiate athletics programs, including eligibility decisions, to the NCAA. The NCAA's Postbaccalaureate Bylaw is neutral on its face, and the NCAA may grant waivers of its Bylaws generally to student-athletes at all of its member institutions, not only at Hofstra and University of Pittsburgh. In these circumstances, it is the NCAA which has the clearest notice of, and the best opportunity to correct, the alleged discrimination against student-athletes under federally-assisted education programs and activities. As a result, holding the NCAA liable best serves Title IX's purposes.

2. The NCAA, however, asserts that nonrecipients lack constitutionally adequate notice that they are covered by Title IX and thus cannot be held liable for their sex-based

the Rehabilitation Act of 1973] could not be more stark").

discrimination under a federally-financed education program or activity. Specifically, the NCAA contends that this Court has held that Title IX is an exercise solely of Congress' Spending Power; that statutory prohibitions imposed as a condition of receiving Federal financial assistance create a contract between the Government and a recipient; that only recipients have adequate notice that they may be held liable for violations of the statutory prohibition and an opportunity to accept or reject Title IX coverage; and therefore that only recipients are liable for violations of Title IX. There are numerous flaws in the NCAA's chain of reasoning.

First, contrary to the NCAA, this Court has never held that Title IX is solely a product of the Spending Power. *Gwinnett* expressly left open the question whether Title IX was enacted exclusively pursuant to the Spending Clause, see 503 U.S. at 75 n.8. Other Court decisions appear to acknowledge that Title IX was also enacted on the authority of Section 5 of the Fourteenth Amendment. See *Cannon*, 441 U.S. at 686 n.7 (relying on Congress' reference to its enforcement responsibilities under the Fourteenth Amendment as authority for including Title IX in the amendment of the Civil Rights Attorneys Fees Award Act of 1976); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (assuming that Title IX is based on Section 5).¹⁸

Second, and assuming that Title IX was enacted pursuant to the Spending Clause, prohibitions in Spending Clause legislation do not apply solely to those in contractual relationships with the Government. *Grove City* clearly holds

¹⁸ The NCAA's implicit argument that in *Gebser* this Court held that Title IX rests solely on the Spending Clause, see Pet. Br. at 12, 27 n.14, overreaches. Nothing in the opinion suggests, much less holds, that Title IX is not also based on Congress' authority under Section 5.

that indirect recipients of Federal assistance, such as colleges whose students receive Federal financial assistance, are covered by Title IX. See 465 U.S. at 564 ("[t]here is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation"). Such entities have *no* contractual relationship with the Government; they are third-party beneficiaries of a Government contract with the student.¹⁹ Title IX's coverage is different from the set of entities in contractual privity with the Government, just as remedies for Title IX's violations differ from contract remedies (to wit, return of grant money to the Government). See *Gwinnett*, *supra*.

This specific point concerning Title IX is generally true of Spending Clause legislation. Recently, in *Salinas v. United States*, 118 S.Ct 469 (1997), this Court upheld the constitutionality of the Federal bribery statute, prohibiting the agents of certain Federal assistance recipients from accepting bribes. The indicted agents argued that the statute rendered unlawful only bribes with a demonstrated effect on Federal funds. This Court rejected that argument, upholding Congressional authority to prevent any "threat to the integrity and proper operation of the federal program." *Id.* at 475. As this reasoning demonstrates, Spending Clause legislation permissibly reaches beyond fund recipients to third parties, including agents, in order to serve and protect the Federal program.

The actual reach of Title IX, like that of any Spending Clause legislation, is strongly affected by the purposes of the Federal act. As this Court explained in an analogous context:

¹⁹ This aspect of *Grove City* was endorsed by Congress when it enacted the Civil Rights Restoration Act of 1987. See S.Rep. 100-64, at 3.

Although we agree with the State that Title I grant agreements had a contractual aspect, the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction. Unlike normal contractual undertakings, federal grant programs originate in and remained governed by statutory provisions expressing the judgment of Congress concerning desirable public policy. [*Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 669 (1985) (citations omitted).]

Cf. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960). (policy of Federal labor law may alter normal principles of contract law). Title IX's dual purposes of protecting a specified class of persons and ensuring that federally-assisted programs do not operate discriminatorily are best served by covering all entities with authority over the operation of such programs, and the private cause of action should be defined with those purposes in mind.

Finally, the central concern addressed by analogizing Title IX to a contract is that of notice -- notice that discrimination is prohibited and notice of specific instances of discrimination as they occur and an opportunity to take corrective action. As explained in detail *supra* at 26-27, those concerns simply are not implicated where, as here, an entity with authority over a federally-assisted education program or activity is held liable for its own discrimination.²⁰

²⁰ The NCAA relies on *Gebser* to argue that it cannot be held liable as an agent or surrogate of its member institutions, Pet. Br. at 27, but *Gebser* supports Smith's position. *Gebser* held that Title IX liability may not be expanded by "application of agency principles," and that education entities are not liable for Title IX violations by their agents and subordinates *unless an official with authority to correct discrimination has knowledge of it and fails*

* * * *

For all of these reasons, Smith's allegation that the NCAA discriminated against her on the basis of sex under an education program or activity that receives Federal assistance states a claim without regard to whether the NCAA itself receives such assistance. Accordingly, Smith is entitled to test her claim against the NCAA on its merits.

II. *The Third Circuit's Judgment That Smith Is Entitled To Amend Her Complaint Should Be Affirmed On The Ground That She Will Reasonably And In Good Faith Allege That The NCAA Receives Federal Financial Assistance.*

The judgment of the court of appeals reversed the district court's denial of Smith's motion for leave to amend her complaint and remanded the case so that Smith could file an amended complaint. See *supra* at 8-9. This Court has often stated that it sits to "review [] judgments, not opinions," and that a judgment may be affirmed on any ground supported by the record. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Bennett v. Spear*, 117 S. Ct. 1154, 1163 (1997); *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n. 12 (1984). The court of appeals' judgment that Smith was entitled to amend her complaint to allege that the NCAA is a recipient of Federal financial assistance and thus covered by Title IX may be

adequately to respond. 118 S. Ct. at 1995-96. Nothing in *Gebser* remotely suggests that an entity with authority over the operation of a federally-assisted program may not be held liable for its own discrimination under Title IX. Indeed, *Gebser* declares that liability should attach to the entity which has notice of, and an opportunity to correct, the conduct alleged to be discriminatory. In this case, that entity is the NCAA.

affirmed most easily on the ground that Smith's amended complaint, in fact, alleges that the NCAA directly and indirectly receives Federal financial assistance and that such an allegation is plainly sufficient to survive a motion to dismiss. Further development of the facts supporting Smith's amended allegations should be left in the first instance for the district court on remand.

A. *The Court Of Appeals Correctly Held That Smith Is Entitled To Amend Her Complaint*

Fed. R. Civ. P. 15(a) instructs that leave to amend a pleading "shall be freely given." Relevant here, "[i]f a motion to dismiss under Rule 12(b)(6) is filed, ordinarily an opportunity to amend should be freely granted if the deficiencies in the complaint can be corrected by amendment." J. Moore, 3 *Moore's Federal Practice* ¶15.08[4] (2d ed. 1994). Such a motion may be denied only if the plaintiff has unduly delayed, acted in bad faith or from a motive to delay, repeatedly failed to cure deficiencies in the complaint through amendments previously allowed, or if the defendant would be unduly prejudiced. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). Liberal allowance of amendments to pleadings is particularly appropriate when a pro se plaintiff is involved. See *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980). Applying this standard, the court of appeals correctly held that Smith is entitled to amend her complaint to allege that the NCAA directly and indirectly receives Federal financial assistance.

There is no dispute that a complaint alleging that the NCAA is a direct and indirect recipient of Federal financial assistance and has engaged in sex-based discrimination

prohibited by Title IX would withstand a motion to dismiss.²¹ Smith proposed to amend her complaint to allege that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Pet. App. 18a (citation omitted). That proposed amendment can and should be read to allege that the NCAA directly and indirectly receives Federal assistance.²² In addition, Smith plainly stated in her brief to the court of appeals that she intended to allege that the NCAA receives Federal financial assistance both "directly" and "indirectly," through its administration of the NYSP Fund, and indirectly from its federally-assisted member institutions. See *supra* at 8.²³ The factual bases for Smith's allegation that the

²¹ Arguably, in consideration of Smith's pro se status, the district court should have construed her original complaint as containing an allegation that the NCAA is a recipient of Federal financial assistance. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (the allegations of a pro se complaint, "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers. . ."); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (federal courts should construe the inartful pleading of pro se plaintiffs liberally). That point is no longer relevant because, although the court of appeals did not reverse on that ground, its judgment was simply that Smith was entitled to amend her complaint to add allegations.

²² The proposed amendment plainly encompasses the NCAA's indirect receipt of funds through either the NYSP Fund or member institutions. It also alleges direct receipt of Federal assistance to the NYSP Fund when read as follows: "[t]he NCAA is a recipient of federal funds because it . . . operates an education program or activity which receives or benefits from such assistance."

²³ The NCAA claims that "[i]n her court of appeals brief (p. 6), Smith asserted for the first time that the NCAA receives federal funds *indirectly* through the NYSP." Pet. Br. at 13 n. 7. But the quotations from Smith's brief make clear that she, in fact, alleged that the NCAA directly and indirectly receives Federal financial assistance as a result of Federal aid to the NYSP Fund.

NCAA receives Federal assistance directly and indirectly were underlined in the Amicus Brief of the National Women's Law Center. See, e.g., Brief of Amici Curiae at 5 n.3 ("[t]he NCAA receives direct federal funding through a grant from the Department of Health and Human Services to the NCAA's National Youth Sports Program"); *id.* at 15 n.11.

The court of appeals correctly concluded that Smith's proposed amendment would cure the alleged deficiencies in her original complaint. "[I]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. at 182. The court of appeals also found that Smith had not engaged in any bad faith or dilatory conduct that would support denial of her motion to amend. Pet. App. 19a. Based on this analysis, the court of appeals correctly concluded that the district court abused its discretion when it denied Smith leave to amend. *Id.*²⁴

For this reason alone, the court of appeals' judgment vacating the district court's denial of Smith's motion to amend and remanding to allow Smith to file an amended complaint should be affirmed.

²⁴ In determining that Smith was entitled to amend her complaint to allege that the NCAA is a recipient of Federal financial assistance, the court of appeals stated that it was not sure "whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded," but that under either view, the district court erred. Pet. App. 17a. The district court had discretion to allow a curative amendment even after dismissal, and Smith's allegation that the NCAA directly and indirectly receives Federal assistance cured any perceived defect in her claim. *Id.* 18a-19a.

B. *Smith Clearly Has A Good Faith Basis Upon Which To Amend Her Complaint To Allege That The NCAA Directly Receives Federal Financial Assistance And Is Thus Subject To Title IX*

In a motion for leave to amend a complaint, a plaintiff seeks an opportunity to make allegations that will allow her to introduce evidence into the record. Plainly, in this situation, evidence supporting those allegations need not already be in the record. As described above, in seeking to amend her complaint after dismissal, Smith had only to show that the complaint as amended would survive a motion to dismiss. This Court, like the court of appeals, may assume that Smith has a good faith basis to allege that the NCAA directly and indirectly receives Federal assistance, particularly in light of her specific statements about the NYSP and the NYSP Fund in her brief to the court of appeals (statements supported by the National Women's Law Center).

In any event, it is clear that Smith will be able to support her allegation. During this litigation, Smith learned of two other pending cases addressing the question whether the NCAA directly and indirectly receives Federal financial assistance and is therefore liable for discrimination under the Rehabilitation Act and Title VI, respectively. See *Bowers v. NCAA*, 9 F. Supp. 2d 460, 493 (D.N.J. 1998), and *Cureton v. NCAA*, Civ. No. 97-131, 1997 WL 634376, at *2 (E.D. Pa., Oct. 9, 1997).

In both of these cases, the plaintiffs alleged that the NCAA receives Federal financial assistance because one of its parts -- the NYSP Fund -- concededly receives substantial Federal aid. And in both cases, the NCAA sought summary judgment on the question whether it receives Federal financial assistance. The NCAA argued that it escapes coverage under the Rehabilitation Act and Title VI because, although it

administers the NYSP, it has set up a separate entity, the NYSP Fund, to receive the Federal money. *E.g.*, *Bowers*, 9 F. Supp. 2d at 493. Both courts, however, denied summary judgment to the NCAA, holding that there are genuine issues of fact concerning whether the NCAA receives Federal financial assistance through the Fund.

The *Bowers* Court explained that an NCAA Committee, the NYSP Committee, administers the NYSP; that the NYSP Board of Directors' powers are limited by the Council of the NCAA; that among the Board members of the NYSP are the Executive Director of the NCAA and the Chair of the NCAA NYSP Committee; that all members of the NYSP Fund Board are employees of the NCAA or members of the NCAA NYSP Committee; that, upon dissolution, any assets of the NYSP Fund belong to the NCAA; and that the NCAA's Executive Director described the NYSP as "'one of the NCAA's best kept secrets'" and characterized it as a "'partnership with the federal government.'" *Bowers*, 9 F. Supp. 2d at 494 (citing exhibits). Based on all of this evidence, the court concluded that the NCAA is not entitled to summary judgment on the question whether it receives Federal financial assistance. *Id.*

In addition, as described in the Statement at 5, the Office of Civil Rights of the Department of Health and Human Services has found the NCAA to be a recipient of Federal financial assistance through the NYSP Fund and thus subject to Title IX's requirements. See *supra* at 5.

These judicial decisions and administrative findings demonstrate that Smith's motion to amend her complaint to add an allegation that the NCAA directly and indirectly receives Federal financial assistance has a good faith basis, and that her

amended complaint would survive a motion to dismiss.²⁵ In these circumstances, the court of appeals thus correctly reversed the district court's denial of Smith's motion to amend her complaint to cure any pleading deficiencies. See *Papasan v. Allain*, 478 U.S. 265, 283 (1986) ("[c]onstruing [the well-pleaded allegations of the complaint] and relevant facts obtained from the public record in the light most favorable to petitioners, we must ascertain whether they state a claim on which relief could be granted").

III. *The NCAA Indirectly Receives Federal Financial Assistance And Is Therefore Subject To Title IX.*

This Court stated in *Grove City College v. Bell*, 465 U.S. 555, 564 (1984), that "[t]here is no basis in [Title IX] for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation" and that, for purposes of Title IX coverage, there is no "distinction between direct and indirect aid." Indirect recipients of Federal aid for education programs

²⁵ As stated above, Smith is not required to cite record evidence to support her motion to amend to add allegations to her complaint. In any event, though, the Court may take judicial notice of the two federal district court decisions and the administrative findings which demonstrate that Smith did, in fact, have a good faith basis to amend. Under Federal Rule of Evidence 201(b), a court may take judicial notice of matters outside of the record if they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The fact that two federal district courts have denied the NCAA summary judgment on the question whether it receives Federal financial assistance falls into this category, as does the fact that the Office of Civil Rights of the Department of Health and Human Services has determined that the NCAA receives Federal financial assistance.

and activities are thus subject to Title IX.²⁶ See also 34 C.F.R. §106.2(h) (defining a "recipient" of federal funds as an entity which receives federal funds "directly or through another recipient," and "operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof").

In enacting the CRRA, Congress made clear its agreement with this holding of *Grove City*. See, e.g., S. Rep. No. 100-64, at 3. In addition, in the CRRA, Congress amended Title IX to define the phrase "program or activity" as "all of the operations of" specified education entities "any part of which is extended Federal financial assistance." The CRRA definition specifies when direct Federal aid to *part* of an education entity constitutes aid to the *whole* entity and, pertinent here, when direct Federal aid to a *single* education entity constitutes indirect aid to *related* education entities.

The NCAA indirectly receives Federal assistance in two ways: First, assuming *arguendo* that the NCAA does not directly receive assistance provided to the NYSP Fund, the NCAA certainly receives such assistance indirectly. Second, the NCAA indirectly receives Federal assistance from its member institutions when the latter assign operation of intercollegiate athletics programs to the NCAA and provide the NCAA with dues and other assistance to carry out the assignment.

²⁶ Indeed, Congress has twice rejected attempts to narrow Title IX's coverage to education programs or activities that directly receive Federal financial assistance. See 121 Cong. Rec. 23845-47 (1975) (rejecting proposed amendment limiting Title IX coverage to programs or activities that directly receive Federal assistance); 122 Cong. Rec. 28144, 28148 (1976) (rejecting proposed amendment "that would have defined federal financial assistance as 'assistance received by the institution directly from the federal government'")(quoted in *Grove City*, 465 U.S. at 568 n.19).

A. *The NCAA Indirectly Receives Federal Assistance Through the NYSP Fund.*

1. Assuming *arguendo* that the NCAA does not directly receive the Federal financial assistance provided to the NYSP Fund, Smith nonetheless has grounds to allege that the NCAA indirectly receives that assistance. The evidence described by the court in *Bowers*, see *supra* at 35-36, supports a claim that the NYSP is effectively governed and operated by the NCAA. Thus, although the Federal aid goes directly to the NYSP Fund, the Fund is alleged to serve only as a conduit for conveyance of the aid to the NCAA. In addition, if the Fund were established to avoid coverage under Title IX and related statutes, the case for attributing indirect receipt of the Federal assistance to the NCAA might be even stronger.²⁷ In these circumstances, an allegation that the NCAA indirectly receives Federal assistance subjects it to Title IX coverage, and the court of appeals' judgment that Smith was entitled to amend her complaint may be affirmed on this independent ground.

2. The CRRA, too, makes clear that the NCAA is an indirect recipient of Federal assistance through the NYSP Fund. The CRRA defines "program or activity" broadly so that Title IX forbids discrimination under "all of the operations of"

²⁷ Some evidence in *Bowers* and *Cureton* suggests that the Fund may have been established by the NCAA solely to avoid liability under the civil rights statutes that apply to entities operating programs receiving Federal financial assistance. See *Bowers*, 9 F. Supp. 2d at 493-94; Exhibits to Plaintiff's Cross-Motion for Summary Judgment and Opposition to NCAA Motion for Summary Judgment in *Cureton*, *supra* (lodged with the Court by *amicus* Trial Lawyers for Public Justice).

specified education entities "any part of which is extended Federal financial assistance." 20 U.S.C. §1687.²⁸

The NCAA is one of the education entities specified by the CRRA. It meets the requirements of subsection 1687(4), because it is an entity established by two or more federally-assisted colleges and universities. The NCAA also satisfies the requirements of subsection 1687(3)(ii), because it is a "private organization" which is "principally engaged in the business of providing education." The facts alleged in *Bowers* support the

²⁸ In pertinent part, the CRRA defines "program or activity" as follows:

For the purposes of this section, the term "program or activity" means *all of the operations of --*

...
(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

...
(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

...
(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

...
(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

...
(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance. 20 U.S.C. 1687 (emphasis supplied.)

allegation that the NYSP Fund is properly considered an "operation" of the NCAA or a "part" of the NCAA within the meaning of Title IX, and there is no dispute that the Fund "is extended Federal financial assistance."

The NCAA thus indirectly receives Federal financial assistance through the NYSP Fund, because the Fund directly receives Federal assistance and is an "operation" or a "part" of the NCAA within the meaning of the CRRA. The court of appeals' judgment that Smith is entitled to amend her complaint to allege that the NCAA indirectly receives Federal financial assistance may be sustained on this basis alone.

B. *The NCAA Indirectly Receives Federal Assistance Because It Operates A Federally-Assisted Education Program Or Activity And Receives Funds From Direct Recipients To Do So.*

1. Hofstra and University of Pittsburgh are members of the NCAA and, like most NCAA member institutions, directly receive Federal financial assistance. Each sponsors intercollegiate athletics. Hofstra, University of Pittsburgh, and the other NCAA member institutions have paid dues and provided other benefits to a joint enterprise, the NCAA, and assigned to that joint enterprise operation of their intercollegiate athletics programs. In these circumstances, as we now show, the NCAA is properly considered an indirect recipient of Federal financial assistance from its member institutions.

The NCAA is not akin to run-of-the-mine downstream payees of a federally-assisted education institution (*i.e.*, a power company or paper goods supplier). And we certainly do not contend that such payees would be covered by Title IX. The

NCAA accepts from its member institutions an assignment of substantial authority over a federally-assisted education program, viz, intercollegiate athletics. The assignment "transfer[s] to [the NCAA] all or part of [the member institution's] property, interest, or rights," including the right to govern and operate the Federally-assisted education program at issue. See *Holywell Corp. v. Smith*, 503 U.S. 47, 53 (1992). By accepting the assignment, the NCAA accepts responsibility for a federally-assisted education program, along with funds to operate that program.²⁹ The NCAA should also be deemed to have accepted the legal obligations that accompany authority over a federally-assisted education program, including the obligation not to engage in sex-based discrimination.³⁰

This conclusion is supported by this Court's decisions holding that, where an entity accepts assignment of a duty or a function, that entity generally takes on the legal obligations attached to that duty or function. Cf. *West v. Atkins*, 487 U.S. 42, 56 (1988) (holding that when a doctor "voluntarily assumed [the State's obligation to provide adequate medical care to a prisoner] by contract," that doctor became a State actor with accompanying constitutional responsibilities); *Terry v. Adams*, 345 U.S. 461, 466 (1953) (holding that a private organization

²⁹ Moreover, at this stage of the litigation, on a motion to dismiss, there is no record evidence concerning whether Hofstra or University of Pittsburgh receive Federal funds intended to operate intercollegiate athletics or concerning the nature and amount of funds (dues or otherwise) transferred from the schools to the NCAA.

³⁰ This conclusion finds support in the regulations implementing Title IX. These regulations extend coverage to the "assignee[s]" of direct recipients of Federal funds, 34 C.F.R. §106.2(h). See also *NCAA v. Kansas Dep't of Revenue*, 781 P.2d 726, 730 (Kan. 1989) (holding that NCAA is entitled to tax exempt status because it "is but an extension of the member institutions and colleges").

which succeeded to the State's control over the political primary process was subject to the State's legal obligation not to discriminate; the right to vote may "not be nullified by a State through casting its electoral process in a form which permits a private organization to practice race discrimination in the election").³¹ Cf. Restatement (Second) Contracts, § 318 (cmt. d (1971)) ("[t]he obligee may, however, have rights against the [assignee of the obligor] as an intended beneficiary of the promise to assume the duty").

In addition, because of the unique nature of intercollegiate athletics, it is particularly appropriate to treat the NCAA as an indirect recipient of Federal financial assistance from its member institutions. Intercollegiate athletics is one of few education programs of a college or university which cannot be conducted without creation of a separate institution to provide governance, administration, and certain operations. See

³¹ Nothing in *NCAA v. Tarkanian*, 488 U.S. 179 (1988), suggests a different result. *Tarkanian* sets forth the test for determining when a private actor becomes a state actor and thus may be held liable for a variety of constitutional violations. *Id.* at 192. The test for determining whether an entity has received Federal assistance is distinct and less demanding. An entity need not be either a state actor or even a direct recipient of Federal assistance to be liable for a Title IX violation. An entity which takes on authority over, and the operation of, a federally-assisted education program or activity and accepts funds to do so, however, has taken on the responsibilities and duties of a Federal fund recipient and should be deemed an indirect recipient of such funds.

Moreover, in *Tarkanian*, this Court concluded that the NCAA had not actually taken on responsibility for the decision of its member institution to discharge the State employee. *Id.* at 197-98. Here, the NCAA plainly has obtained from its member institutions full authority to govern eligibility for participation in intercollegiate athletics, and member institutions may not participate in intercollegiate athletics unless they abide by the NCAA's decisions. The legal obligation of the federally-assisted member institutions to refrain from discrimination should thus be attributed to the NCAA.

NCAA v. Board of Regents, 468 U.S. 85, 101, 117 (1984) (recognizing that for intercollegiate athletics to exist, a "myriad of rules . . . must be agreed on" and that "a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved"). Thus, creation of a separate entity is necessary for the existence of intercollegiate athletics, but that separation is strictly a consequence of the inherent nature of the program and should not shield the NCAA from liability if it discriminates while operating a federally-assisted education program using funds received from its federally-assisted member institutions.

Finally, the attribution of recipient status to the NCAA is also supported by the weight of lower court authority. See *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 271-72 (6th Cir. 1994) (holding that the Kentucky High School Athletic Association indirectly receives Federal funds because a direct fund recipient, the State Board of Education, has delegated to it governance of the State's interscholastic athletic programs, and because direct fund recipients, member schools, provide it with funds to conduct the delegated activity).³²

³² See also *Pottgen v. Missouri State High School Activities Ass'n*, 857 F. Supp. 654, 663 (E.D. Mo.) (holding the Missouri High School Activities Association subject to section 504 of the Rehabilitation Act of 1973 because it "receives federal funds indirectly through its members, which delegate to it a portion of their responsibilities for regulation of interscholastic activities"), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994); *Sandison v. Michigan High School Athletic Ass'n*, 863 F. Supp. 483, 487 (E.D. Mich. 1994) (holding Michigan High School Athletic Association subject to section 504 of the Rehabilitation Act because it receives funds and facilities from direct recipients to carry out interscholastic athletic functions), *reversed in part, and appeal dismissed in part*, 64 F.3d 1026 (6th Cir. 1995); *Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F. Supp. 663, 667 (D. Conn.) (same), *appeal dismissed as moot*, 94 F.3d 96 (2d Cir. 1996); *Graham v. Tennessee Secondary School Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890, at *11 (E.D. Tenn. Feb. 20, 1995) (holding Tennessee Secondary

There is broad language in the court of appeals' opinion suggesting -- in substantial tension with *Paralyzed Veterans* -- that mere beneficiaries of Federal assistance programs might be subject to Title IX. The opinion below relies on a Department of Education regulation in support of this expansive interpretation. The NCAA understandably seizes upon this language and then devotes virtually its entire analysis to destroying this straw man. No doubt, the NCAA hopes that this effort will divert the Court's attention from the NCAA's actual status. But it is no mere beneficiary of Federal assistance and the court of appeals' decision to permit Smith to amend her complaint to state claims against the NCAA under Title IX does not in any way depend on the over broad language in the opinion below.

To the contrary, the NCAA has been assigned authority to operate a federally-assisted education program and been provided funds from a federally-assisted education institution to carry out that assignment. The suggestion that by interpreting Title IX to preclude the NCAA from using its peculiar status to exclude women systematically from intercollegiate athletic opportunities through an inherently arbitrary waiver policy will dramatically expand the pool of potential Title IX defendants is fanciful. Petitioner's hyperbole simply ignores the fact that the vast majority of recipients retain authority over their education-related operations and the fact that the relationship between the NCAA and intercollegiate athletics is *sui generis*.

School Athletic Association subject to Title VI of the Civil Rights Act of 1964 because a direct fund recipient delegated to it the responsibility "to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis") (internal quotation omitted), *appeal dismissed*, 107 F.3d 870 (6th Cir. 1997).

In sum, respondent does not embrace the suggestion below that the statute and regulation can fairly be understood to apply to mere beneficiaries. Where respondent parts company with the NCAA is in leaping from that quibble about the opinion below to the conclusion that the Third Circuit's judgment is fatally flawed. On that score the NCAA is simply wrong.

In the circumstances presented here, the Federal assistance received by NCAA members is properly attributed to the NCAA.³³

2. The NCAA also indirectly receives Federal assistance as described by the CRRA because it is an "operation" of its federally-assisted member institutions, including Hofstra and University of Pittsburgh. See 20 U.S.C. §1687 (defining "program or "activity" as "all of the operations of . . . (2)(A) a college [or] university . . . any part of which is extended Federal financial assistance"). The operation of intercollegiate athletics programs requires some joint governance and administration, and, for that reason, the NCAA is an "operation" of multiple institutions. But the NCAA's authority over the operations of numerous federally-assisted education programs and activities only heightens its ability to injure others with discrimination, and does not shield it from coverage as a "program or activity" under the CRRA.

³³ The NCAA does not resemble an ultimate beneficiary of Federal education assistance, because it receives funds from federally-assisted colleges and universities in order to operate an education program which, in turn, serves ultimate beneficiaries (here, students). These circumstances plainly distinguish this case from *Paralyzed Veterans*, *supra* where this Court held that a mere beneficiary of Federal assistance is not subject to the prohibitions of statutes forbidding discrimination under federally-assisted programs and activities.

This reading of the statutory language finds strong support in the legislative history of the CRRA. Congress intended that the CRRA be given the "broadest interpretation." S. Rep. 100-64 at 5, 7.³⁴ As noted above, its concern was "with state agencies, the educational institutions and *others* who operate programs or conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination." *Id.* at 25 (internal quotations omitted; emphasis added).³⁵ Indeed, the NCAA itself testified in opposition to the bill that became the CRRA based on its belief that athletic conferences would be subject to Title IX if their member institutions were. See *supra* at 25. That same, accurate reading of the CRRA's meaning sweeps in the NCAA as an "operation" of federally-assisted education institutions.

* * * *

For each of these reasons, the NCAA indirectly receives Federal financial assistance, and the court of appeals correctly held that Smith was entitled to amend her complaint to make such an allegation.

³⁴ See also 133 Cong. Rec. S2249-51 (1987) (remarks of Sen. Kennedy); *id.* at S2251 (remarks of Sen. Weicker).

³⁵ Senator Hatch gave the following examples of the breadth of coverage established by the "all of the operations of" language in the CRRA:

If a research hospital receiving Federal aid establishes a research laboratory jointly with a pharmaceutical company, and the research laboratory does not receive Federal aid, it is covered because it is an "operation of" the hospital.

The same result occurs if the private entity joins with a public entity to create a joint venture or if two public entities join to create a third entity (*i.e.*, "all operations" of entities listed in paragraphs (1) and (2) are also covered). Such "operations" include subsidiaries and newly established entities, even if created with other organizations. [133 Cong. Rec. S2431 (1988).]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 8, 1998